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NO. 04-585

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLOTTE KLINGLER, *ET AL.*,
Petitioners,

v.

DIRECTOR, DEPARTMENT OF REVENUE,
STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT DIRECTOR OF REVENUE IN RESPONSE TO PETITION

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QUESTIONS PRESENTED

1. Whether, in 42 U.S.C. § 12132 (2000), Congress barred states from collecting a fee for issuing a placard, available only to those who are disabled, manifesting the eligibility of the purchaser to use parking spaces reserved for the disabled.

2. Whether Congress has authority under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity, by virtue of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101-12213 (2000), from suit seeking to prevent a state from charging a fee for a placard, available only to the disabled, that is a nonexclusive means of manifesting a person's eligibility to use parking spaces reserved for use by the disabled.

3. Whether Congress has authority under the Commerce Clause to abrogate the states' Eleventh Amendment immunity, by virtue of Title II of the Americans with Disabilities Act of 1990, 42 U.SC. § 12101-12213 (2000), from suit seeking to prevent a state from charging a fee for a placard, available only to the disabled, that is a nonexclusive means of manifesting a person's eligibility to use parking spaces reserved for use by the disabled.

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INTRODUCTION

The U.S. Court of Appeals for the Eighth Circuit held that Congress lacked authority under the Commerce Clause to enact Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213 (2000), insofar as Title II is applied to a state charging for issuance of parking placards that are a nonexclusive means for disabled persons to demonstrate their qualification to use parking places reserved for their use. In doing so, the Eighth Circuit cited its precedent in *Alsbrook v. City of Manuelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *cert. dismissed*, 529 U.S. 1001 (2000), holding that Congress lacked authority to act under Section 5 of the Fourteenth Amendment – a decision the scope of which, at least, is called into question by this Court's decision in *Tennessee v. Lane*, 124 S.Ct. 1978 (2004). But in reaching the question of congressional authority, regardless of the source, the Eighth Circuit bypassed entirely the question whether such a charge actually would violate the statute.

The Director of Revenue of Missouri concurs with the petitioners that the Eighth Circuit ruled without the benefit of *Tennessee v. Lane*, and that *Lane* affects the validity of the broad declaration made in *Alsbrook*. Thus the Director concurs that if the question of congressional authority must be reached, the Eighth Circuit should reconsider it in light of *Lane*. *See* Petition at 5-7. But there was a means of resolving this case without reaching the constitutional question. This Court should grant the petition, vacate the Eighth Circuit's decision, and remand, as petitioners request. But rather than remand solely to reconsider in light of

Lane, the Court should instruct the Eighth Circuit to first decide whether what Missouri does is covered by the ADA at all.

STATEMENT

Missouri Rev. Stat. § 301.142 (Supp. 2003) provides two means by which disabled persons can obtain official, visible confirmation of their eligibility to use parking spaces reserved for the disabled. Under § 301.142.3, physically disabled persons who own motor vehicles, those who use their motor vehicles to transport physically disabled members of their households, and those who use their motor vehicles at least 50% of the time to transport a physically disabled person, may obtain specially marked license plates that authorize them to park in disabled access parking spaces. These license plates may be obtained from the Director of the Missouri Department of Revenue at no additional fee beyond that ordinarily charged for license plates. Mo. Rev. Stat. § 301.142.4.

Under § 301.142.5, at issue here, physically disabled persons, parents or guardians of physically disabled persons, and any entity that transports more than one physically disabled person may obtain a removable windshield placard that authorizes use of disabled access parking spaces. The fee for each placard is $2.00 per year.

Charlotte A. Klingler, Vicki L. McGarry, and Charles E. Wehner filed this action against the Director of the Missouri Department of Revenue. They alleged that the $2.00 fee violated the Americans with

Disabilities Act and regulations issued by the United States Department of Justice. The plaintiffs sought: (1) a declaration that the placard fee was unlawful; (2) an injunction against further collection of the fee; and (3) reimbursement of the fee to proposed class members who had paid it.

The district court denied the Director's motion for summary judgment and granted the petitioners' motion, concluding that the placard fee charged to the three individual plaintiffs violated the surcharge prohibition of 28 C.F.R. § 35.130(f) (2004). The district court also certified a class of:

> All purchasers of permanent, removable windshield placards, pursuant to Missouri Revised Statutes Section 301.142 since January 26, 1992, and all persons who will in the future be required to pay money for such placards until and unless declaratory and injunctive relief prohibits the requirement of payment as a condition of full access to parking accommodations reserved for persons with disabilities.

After the Eighth Circuit issued its decision in *Alsbrook v. City of Maumelle*, the district court granted the Director's motion for judgment on the pleadings and dismissed this case on the ground that application of the ADA to states was not a proper exercise of Congress's power under § 5 of the Fourteenth Amendment and, consequently, did not validly abrogate the states' Eleventh Amendment immunity. Plaintiffs appealed.

The Eighth Circuit affirmed the dismissal of plaintiffs' claims for damages, but determined that the Eleventh Amendment did not generally bar plaintiffs from seeking declaratory and injunctive relief under the ADA pursuant to *Ex parte Young*, 209 U.S. 123, 155-56 (1908). *Klingler v. Director, Department of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002). That court then remanded the case for further proceedings. *Id.*

On remand, the district court again held that the placard fee violated the ADA, confirmed its summary judgment in favor of plaintiffs and denial of summary judgment to the Director, and declared that the placard fee violates Title II of the ADA and is preempted by the Supremacy Clause. Pet. App. at 19. The court also enjoined the Director from any further collection of the placard fee. *Id.*

The district court stayed its judgment pending appeal, and the Director filed a timely notice of appeal.

The Eighth Circuit held that the question of congressional authority under Section 5 of the Fourteenth Amendment to enact Title II of the ADA was resolved in *Alsbrook*. Pet. App. at 4-5. The court then rejected the argument that even if Congress lacked authority under the Fourteenth Amendment, it could proceed under the Commerce Clause. *See* Petition Appendix at App. 5-12.

RESPONSE TO REASONS TO GRANT THE PETITION

1. The Director does not dispute that this Court should remand this case to the Eighth Circuit for reconsideration. As to the question of congressional authority under the Fourteenth Amendment, the Eighth Circuit relied below solely on its *en banc* decision in *Alsbrook*. That broad decision – holding that Congress could not, in Title II, abrogate in any respect the states' Eleventh Amendment immunity – cannot be reconciled with *Tennessee v. Lane*. Perhaps the Eighth Circuit will conclude that although congressional authority under the Fourteenth Amendment extends to access-to-the-courts claims such as the one made in *Lane*, it does not extend so far as to permit Congress to ban states from charging a nominal fee for a parking placard. Only then would it make sense for the Eighth Circuit to reach the Commerce Clause issue.

But the Director is not satisfied with petitioners' proposal that the matter be remanded solely to complete that analysis, for there is a preliminary step – one that the Eighth Circuit skipped entirely.

When interpreting a statute, courts must give it a construction, if reasonably possible, that avoids constitutional doubts. *Harris v. United States*, 122 S.Ct. 2406, 2413 (2002). And courts are obligated to avoid deciding constitutional questions needlessly. *Christopher v. Harbury*, 122 S.Ct. 2179, 2188 (2002). The Eighth Circuit violated these very basic rules. It failed to address the Director's argument that both the ADA and the regulation invoked by the plaintiffs may be

reasonably interpreted not to prohibit Missouri's placard fee.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Assuming that the petitioners are "qualified individual[s] with . . . disabilit[ies]," the state's charge for removable windshield placards that authorize parking in disabled access parking spaces does not exclude plaintiffs from participation in, or deny them access to, any state service, program, or activity, and does not subject plaintiffs to discrimination.

The benefits cited by petitioners – access to parking spaces set aside for individuals with disabilities, and placards manifesting eligibility to use those spaces – are available only to individuals with disabilities. And charging a nominal fee for placards that are a nonexclusive means of manifesting eligibility does not make the placard service discriminatory, for individuals without disabilities have no access to the placards at any price.

Rather than specifically basing their claim on any language of the ADA itself, petitioners relied below on a regulation promulgated by the Department of Justice to implement the ADA, 28 C.F.R. § 35.130(f). That regulation merely articulates the rule that the discrimination barred by Title II of the ADA includes

the imposition of fees to cover the costs of nondiscriminatory treatment:

> A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the [ADA] or this part.

But again, charging for windshield placards does not discriminate against individuals with disabilities vis-à-vis individuals without disabilities; individuals without disabilities (other than those who transport the disabled) simply cannot obtain such placards.

The Eighth Circuit never considered whether the placard fee violated either the ADA or 28 C.F.R. § 35.130(f). If the Director is right, and the fee is permissible under the statute and regulations, there was no reason for the Eighth Circuit to reach the question of congressional authority. Thus the case should be remanded with instructions to consider whether the constitutional question can be avoided – *before* considering whether this particular application of Title II is permissible under *Tennessee v. Lane*.

2. Because the Eighth Circuit did not address *Lane*, and because the *Lane* holding is limited, this is not an appropriate case in which to consider any conflict among the circuits. *Lane* demonstrates that the constitutionality of congressional abrogation of the

states' Eleventh Amendment immunity in Title II of the ADA may not be an "all or nothing" proposition. But all of the cases the petitioners cite fit into two categories: those, like *Alsbrook*, that treat it as an "all or nothing" proposition; and the more recent ones that apply *Lane* to particular statutes and circumstances. The Eighth Circuit has never taken a post-*Lane* position, so we simply do not know whether it is in conflict with any post-*Lane* decision by any other court. Taking up this case on the merits on the basis of a conflict among the circuits would be premature.

3. This is not the right case in which to address any such conflict for another reason: in light of the position already taken by the State of Missouri in support of the constitutionality of Title II in *Tennessee v. Lane*, the Respondent is not in a position to defend the position taken by the Eighth Circuit here. *See* Brief of the States of Minnesota, etc., in *Tennessee v. Lane*, No. 02-1667 (2004).

True, here, in the lower courts the Director asserted constitutional infirmities in the ADA, thus preserving an issue that was – and is – being litigated elsewhere, and that had apparently been resolved in the Eighth Circuit in *Alsbrook*. Failure to do so might have left the Director with a court order requiring her to abandon charges for placards, even if this Court ultimately held that Title II – either in its entirety or as applied to similar cases – could not or did not constitutionally abrogate the states' immunity in these circumstances. Certiorari would be better granted in a case in which there is a party who has not previously

taken the position in this Court that Missouri took in *Lane*.

And there will be such an opportunity. In the last few weeks, courts have issued rulings in a number of pending cases in which the constitutionality of possibly similar applications of Title II of the ADA are at issue. Among them are:

- *Miller v. King*, 384 F.3d 1248 (11th Cir. 2004), holding that Congress does not have authority under 14th Amendment to abrogate the immunity of state defendants from monetary claims under Title II. Petitions for rehearing en banc were filed by the plaintiff and by the United States on October 27 and October 29, 2004, respectively.
- *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004), where the court applied *Tennessee v. Lane*, and held that Title II was a valid exercise of Congress's power under Section 5 of the 14th Amendment because at least one of plaintiff's claims implicated his right of access to courts. The ADA claim was reinstated and the case apparently is proceeding on remand.
- *Jamison v. Delaware*, 2004 WL 2345183 (D. Del. 2004), holding that Congress had no power under Section 5 of the 14th Amendment to enact Title II.
- *Johnson v. Southern Conn. State Univ.*, 2004 WL 2377225 (D.Conn 2004), holding that a damages claim under Title II against a state is available only for a violation of a fundamental right.

CONCLUSION

For the reasons stated above, the Court should grant the petition, vacate the Eighth Circuit's decision, and remand for consideration of the Director's argument that the fee for disabled parking placards is permissible under the statute – and, if that is not the case, to then consider whether the Title II of the ADA is a valid exercise of congressional authority in light of *Tennessee v. Lane*.

Respectfully submitted,

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